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# **RULES VERSUS DISCRETION IN FINANCIAL REMEDIES ON DIVORCE**

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## **ABSTRACT**

This article draws on data from a recent empirical study to examine the role of discretion in financial remedy cases on divorce, particularly in the ‘everyday’ needs-based cases that constitute the bulk of the caseload in England & Wales. It explores practitioner and judicial experiences and perceptions of the discretionary Matrimonial Causes Act 1973 regime to inform current debates about potential law reform in this area. In particular it provides findings on the issue of geographical variation in outcome as a lens through which to examine the rules versus discretion conundrum. The central argument made is that (1) the rules-discretion question is not a stark choice between opposites, but rather requires a decision about where along a spectrum between those poles to place a given legal regime; and (2) that the issue must be addressed in terms of both (a) substantive principle, where clarity and consistency about what the financial settlement should be seeking to achieve is vitally important, and (b) the law’s practical operation – the fashioning of particular packages of orders transferring value between the spouses – where greater discretion may be necessary to ensure fairness.

## **I. INTRODUCTION**

The theme of ‘rules versus discretion’ is a perennial one with which family lawyers (and other lawyers) worldwide have to contend. This article considers that debate in the context of the law governing financial remedies on divorce in England & Wales, drawing on data from a recent empirical study of financial settlements obtained through the family justice system, mostly by consent. It examines both the general theme and particular concerns about apparent geographical variation in financial remedies law practice across the jurisdiction. Though grounded in the English setting, the issues canvassed in this article are of broader interest across family law, not least for those jurisdictions currently reviewing their equivalent laws.<sup>1</sup>

The current law of financial remedies on divorce in England & Wales has many defenders, not least amongst the judiciary.<sup>2</sup> But it also has its detractors, prominent amongst them Baroness Deech, proposer of a Bill (Deech, 2017) that would effect radical reform. Part of her criticism of the current law relates to its discretionary nature:

At the crux of the issue is the value of judicial discretion in every case versus plain rules, as contained in the Bill. Our divorce judges are doing their best with care, generosity and sensitivity, but the result is uncertainty, expense and unpredictability. The rule of law demands that the law be predictable and certain, all the more so when the Government have removed the prop of legal aid.

A couple of prominent family judges will no doubt say they are opposed to reforming the law to bring in clear and understandable firm rules, but they are the ones whose intricate judgments have aggravated what is already obsolete. Their preference for individual tailor-made solutions is unaffordable.<sup>3</sup>

She suggests that 'most people prefer the certainty of misery to the misery of uncertainty'.<sup>4</sup>

Contrast the view expressed by the Minister:

The Government agree that there is scope for greater clarity and certainty concerning the law and the court's practice in this important area, but we wish to identify ways to achieve this that do not cause hardship and undermine fairness, which, I say with great respect, this Bill would be likely to do. Clarity and predictability must be balanced with the need for flexibility, with the possibility that flexibility can sometimes bring fairness that certainty precludes.<sup>5</sup>

In contributing to the general debate about rules and discretion, this article also explores a related issue raised by the Law Commission (2014b, para 2.49). Having noted evidence of geographical variation in awards made under the 1973 Act, it said:

If that is true [that there is a huge difference of approach between different courts], we do not know whether the geographical inconsistency arises from geographical variations in the employment market and other factors which might provide an objective justification for the difference, or whether it is an ideological difference which cannot be so justified. Even if there are regional differences in income and employment patterns, differences in judicial practice are problematic if they give rise, not to fact-

sensitive decision-making, but to forum shopping (that is, practitioners choosing particular courts in order to get the result their clients want).

The data on which this paper draws derive principally from interviews with 32 practitioners (solicitors and mediators)<sup>6</sup> conducted in four areas of England in 2012/13 (shortly before the legal aid reforms were implemented in 2013) and two focus group discussions conducted in 2016 with 14 first instance judges (District Judges and Deputies) drawn from several areas of England.<sup>7</sup> We set those data in the context of some headline data from a court file survey of c.400 cases collected in 2012 from cases concluded across 2010-12 in four courts situated in the areas where the interviews were conducted. The court file sample is not nationally representative, but the four courts were selected with a view to covering a socio-economically diverse range of populations.

Much of the discussion with practitioners centred on recent cases they had handled, but they were also asked more general questions, including their views on discretionary and rule-based approaches to financial remedy cases. Discussion with the judges was based around a vignette involving a typical needs-based case,<sup>8</sup> and sought to probe the issue of geographical variation.

## II. DISCRETION VERSUS RULES: A BASIC COMPARISON

There is an extensive literature, within family law scholarship and beyond, on the relative pros and cons of rule-based and discretionary decision-making (for a full recent survey and evaluation, see Miles, 2017). It is important to acknowledge at the outset that the choice is not as stark as is commonly presented: as Sunstein (1995) charted in his seminal article, there is a wide range of juristic tools that can be plotted along a spectrum from strong discretion to strict rules, with more and less rule-like provisions along the way. But it is helpful nevertheless to frame the discussion at least in a preliminary way between the two poles. Canadian scholar, Rollie Thompson (co-architect with Carol Rogerson of Canada's Spousal Support Advisory Guidelines) has provided an excellent overview of this question (Thompson, 2000) from which we draw our even more succinct summary here, in order to introduce the topic before we turn to the qualitative data. Many of the issues canvassed here emerge from our data:

## **1. The virtues of rules**

Rules help us to manage a high throughput of cases efficiently, consistently and predictably. They provide more or less rough justice, providing decent answers for most cases. Occasionally 'imperfect' answers may be tolerable where the issues at stake are relatively minor (in £ amounts or qualitatively) and/or where the transaction costs of fixing on a more 'accurate' answer, customised to the individual case, would be disproportionate to the subject matter. This aids litigants who cannot meet higher transaction costs, to that extent creating a more level playing-field. By generating predictable answers, underpinned by clear rights and corresponding duties, rules help couples manage problems before they arise and aid settlement should dispute occur. They encourage like treatment of like cases, and help to avoid discriminatory or biased decision-making. They save court time as there is no need to consider first principles in each case, that exercise having been undertaken by the rule-maker.

## **2. The virtues of discretion**

Discretion enables the legislator to govern areas of human activity in which the law must help resolve disputes, but where either there is no consensus on what the relevant rule should be or values and/or behaviours are changing quickly such that any rule created might quickly be overtaken by events. Discretion is also useful in fields where many factors may be relevant but they coalesce in different cases in myriad ways, and it is felt difficult or impossible to decide in advance how those factors should be balanced in order to articulate a determinative rule. The individualised decision-making this affords may be important for family disputes: here, the human costs of getting the answer 'wrong' could be high, so we might bear higher transaction costs to reach the 'right' decision. Discretion allows individuals to have *their* case heard on its full merits, giving them a sense of procedural fairness. Discretion can also avoid the pitfall of 'evasion' to which rules may be subject, where individuals seek deliberately to arrange their affairs so as to achieve an outcome that is incompatible with the spirit of the rule and the mischief at which it is directed.

## **III. DISCRETION IN PRACTICE: 'THE MISERY OF UNCERTAINTY'?**

Against that backdrop, we now turn to the qualitative data from our study.

## **1. A range of opinion**

Although their responses are not necessarily representative or exhaustive of the full range of opinion that practitioners generally might have, our interviews with practitioners yielded a spectrum of opinion on rules and discretion in the financial remedy law context. Based on our analysis of the interview data,<sup>9</sup> we plotted practitioner views along a spectrum, identifying their positions when quoting from them below as follows:

- Strongly in favour of discretion ('strong pro-D'): 3 practitioners, all solicitors
- Slightly in favour of discretion ('slight pro-D'): 7 practitioners – 3 mediators, 2 solicitors and 2 solicitor-mediators
- Neutral ('neutral'): 8 practitioners – 2 mediators, 2 solicitors and 4 solicitor-mediators
- Slightly against discretion ('slight anti-D'): 10 practitioners – 3 mediators, 7 solicitors
- Strongly against discretion ('strong anti-D'): 2 solicitors.

It is interesting to note the number of solicitors in this small sample expressing reservations (or at best neutrality) about discretion. This corresponds with the more reserved position taken by solicitor organisations in responding to the Law Commission's 2012 consultation question (see Law Commission, 2014b, from para 3.132) about whether any potential reform of spousal support should take the form of a reformed discretionary approach or a formulaic calculation, such as Canada's flexible Spousal Support Advisory Guidelines (see *ibid*, from para 3.121 and Rogerson and Thompson, 2008). Whilst the responses of judges (Family Division and Association of District Judges) and the Family Law Bar Association were generally strongly supportive of discretion, both Resolution (the specialist family law solicitors' organisation) and the Law Society flagged concerns (see Law Commission, 2014a). These included: the cost of operating a discretionary system at a time when court and many parties' resources are heavily constrained, the potential to encourage forum shopping, the creation of unrealistic expectations, and lack of accessibility and clarity of the law, in particular for self-represented parties.

## 2. Interviewees' reflections on core issues in the rules/discretion debate

### A. Potential difficulties with rules in the financial remedy context

When invited to comment on rules versus discretion in this arena, unsurprisingly English family lawyers refer to the experience of child support:<sup>10</sup>

*The only thing I can compare it to is things like the CSA – it's very formulaic and the percentages depend on the number of children. I think that works really well for that. Whether or not you could do that necessarily for the financial claims, I don't think you could. I think there needs to be discretion. (S26, slight pro-D)*

Both child support and debates about moving spousal support to a more formulaic approach led some interviewees to express scepticism about IT-based solutions:

*...it's a fair system [currently]... although I'm sure it will come in in time and all divorces will be dealt with in India with a computer programme or something and somebody giving some very basic legal advice, and then a printout saying this should be a solution once you've imported all the details – I'm sure that will happen. But it's all of an unknown and I can't really see how a percentage formula, a structured formula, could realistically work. (S21, strong pro-D)*

While the potential efficiency of rule-based solutions was noted, it was doubted that a formula could capture the full range of relevant information:

*I think a formulaic approach would probably help people resolve matters quicker but not necessarily fairly. ... the difference in family law is that you can't type all your information into a computer ... You could do it that way but it wouldn't be fair because there's always something – families are different. (SM27, slight pro-D)*

And that could result in injustice, as this solicitor put it, rather pithily:

*I think it's better to be broadly correct than precisely wrong. (S17, strong pro-D)*

### *B. The capacity to create bespoke solutions*

Several interviewees valued discretion's capacity to permit bespoke settlements that ensured a good 'fit' of outcomes for the individuals involved. That 'fit' might involve quite subjective conceptions of fairness, sometimes shaping creative outcomes that courts would be most unlikely to devise in adjudicated cases. Exemplifying this, one case in the court file survey entailed an order permitting the adult children of the family to remain in the former matrimonial home (FMH) without the parents (whose accommodation needs were being met by new partners), the house to be sold and proceeds shared as and when requested by either spouse.

Parties using mediation might particularly want to be able to adopt such an approach:

*I think [prescriptive rules] would make life even more difficult for mediators because even though there aren't [fixed rules] at least we can say 'amongst yourselves, think about what's fair because your circumstances are always going to be different from the next person's, so try and get something which is fair to you which you can then agree to.'*  
(M8, slight pro-D)

This flexibility might involve extra-legal considerations coming into play (cf Barlow et al, 2017 on the role of parties' norms in ADR, many extra-legal and creative, and Hitchings et al, 2013 on the range of factors influencing settlement):

*Some people settle in terms that look on the face of it not to be quite fair but it's fair to them because, I don't know, he was very kind to my mum and I don't want to take every penny, even though I could. There are cases like that, funnily enough.* (SM27, slight pro-D)

Whilst the following practitioner thought that parties would negotiate less if the law were more prescriptive (see further below), they felt that discretion allowed more bespoke outcomes:

*[I]f it were more prescriptive, you would say, well, this is all you get because that's what the rules say. But if we can exercise discretion*



*through negotiation, we may say, yes, that's the rule, but in my particular case you know that I need this, or whatever, and I think it's more humane as it is at the moment. (S24, slight pro-D)*

The focus group discussions suggested that party preference was a key explanation for the prevalence of clean break settlements (i.e. making no provision for ongoing spousal support), even at the expense of leaving the economically weaker spouse under-provided for.

*They [parties] all want to move on. ... [T]hey want a clean break on the whole, and they don't want to be tied in, they don't want to wait for their money. I think that's the reasoning: they want to start again. (J3)*

The judges also discussed family contributions being offered to facilitate settlements (e.g. funding a buy-out, or making a clean break solution palatable by offering to support one spouse should some difficulty with the children prevent her from working), a practice also evident in the court file survey and interview data. This sort of factor might emerge either in the course of correspondence with the judge over a consent order approval or during contested proceedings:

*[P]arental/grandparental support is a commonplace, and we would be foolish if we didn't recognise that reality: the bank of Mum and Dad. ... this is really an FDR [Financial Dispute Resolution hearing<sup>11</sup>] issue and only an FDR issue. For final hearing you're not supposed to take it into account. Can't, unless you're told it. (J7)*

### *C. Rules: limiting scope for argument – or creating scope to play the system?*

Solicitors whom we categorised as anti-discretion were concerned to limit the scope for argument that, in their view, discretion foments:

*I think people have different expectations ... let's assume people always hope for the best, the fact that you might do better if you keep negotiating or you go to court – I think that uncertainty keeps people arguing. (S23, strong anti-D)*

Similarly, clearer parameters would assist by narrowing the options for settlement:

*At the moment both sides still believe that they're going to get a fantastic deal: either from the husband's view they're not going to pay any maintenance or give any capital more than 50%, and from the wife's point of view they're going to get 70-80% of the capital and the assets. And until that is stopped, people will still – we're all aspirational – we all want more. ... Whereas if they knew from the outset that the law was, if you like, 55/45 as a starting and finishing point, I think it would stop a lot of the to-ing and fro-ing – lawyers' ping-pong I call it – asking for unrealistic stuff. (S11, strong anti-D)*

Another solicitor suggested that greater legal clarity would help clients be 'far more sensible about their approach, insofar as not trying to argue every point because it's very often the case of every little minute detail becomes a point of contention.' (S12, slight anti-D). These practitioners would presumably sympathise with Baroness Deech's view that the uncertainty of discretion produced misery for their clients.

On the other hand, rules might create new opportunities for disagreement, or amplify the importance of particular points that may have been less vital in a discretionary system, or may simply fail to remove existing grounds for dispute. For example, systems that require the identification and valuation of specific pools of assets against which orders may exclusively be made may attract arguments about the existence of assets, about the criteria that determine whether a given asset falls in that pool, and about valuation. Rules might also encourage 'gaming' of the system or just displace argument. One mediator suggested that the current law is:

*a bit like putting lots of ingredients to get an answer. Rather than  $x=y$ , it's a, b, c, d, e, f, g taken into account and given different weights, and then you get an answer ... I suppose the opposite side, the risk is that – and I know this happens in terms of the CSA calculator – they'll work out the CSA money, and one or other of them will say, I want my 4 days a week because that means I can reduce £2.40 kind of thing, so I don't actually know if there's a right answer. ... That doesn't necessarily help because potentially it creates more arguments. (M4, neutral)*

#### *D. Promoting settlement or forcing settlement?*

We have seen that the space afforded by discretion to negotiate bespoke settlements may positively assist settlement by giving parties room for manoeuvre. In their different way, rules might achieve the same objective by providing clearer parameters within which to negotiate. But discretion might also provide a negative impetus (a stick) to settle, owing to perceptions (addressed below) about the unpredictability of putting one's fate instead in the hands of a judge:

*So you either settle this with something you're happy with, or you gamble going to court and maybe getting a moody judge and you get something you're very unhappy with. I think sometimes that's not a bad thing. If you want to take that risk of letting some chap sit there and decide your life, then you can do that, or you can take back the power and agree it yourself.* (S26, slight pro-D)

But would that produce better or worse outcomes than a rule-based system?

*[T]he situation in law at the moment throws up anomalies and unfairness ... with a more prescriptive approach, it would throw up anomalies and unfairness in the same way but actually it would – it wouldn't encourage settlement, it would force outcomes ... very much as the CSA does.* (SM32, neutral)

In this solicitor-mediator's view, neither approach is perfect, even if the discretionary route might give clients (the semblance of) choice.

#### *E. Catering for lawyers or for the parties?*

Interviewees showed some awareness that their preference for discretion might at least in part simply reflect their familiarity with that approach, and that discretion might not be the better option for those divorcing without legal advice and assistance:

*I think the discretionary approach is much better. Of course, I would say that being a lawyer because it's kind of better for the lawyers really, isn't it? It's the only thing I've ever known.* (S21, strong pro-D)

Those practitioners concerned about discretion felt that a rule-based approach could offer parties greater predictability and consistency:

*If the law was more prescriptive, I think it would be helpful, only because then we could operate within the parameters of thinking. ... We can then say, this is a fact, and that's helpful rather than saying, well, you know this could happen and that could happen.* (M6, slight anti-D)

This mediator also suggested that a more prescriptive law might assist litigants in person. They are ill-equipped to access what Bird (2002) called the 'Talmudic body of knowledge', fully familiar to legal practitioners, that has accreted around the deceptively simple but ultimately unilluminating Matrimonial Causes Act 1973. However, very few divorcing couples get as far as a judge<sup>12</sup> and, as we have just discussed, even accessing judge-made law may be equally difficult for many.

#### *F. 'The range' – knowable and known, or not?*

One defence that has often been made of English financial remedies law is that, while there appears to be a broad discretion, 'the range' of likely outcomes for any given case is pretty clear – at least to lawyers and so to their clients (Hitchings, 2009):

*[W]e pretty much know as practitioners if you've got children, you're going to be looking at a starting point of 60/40. If it's an earning discrepancy, you tend to move a little bit further away from that* (S13, neutral)

Another considered that settling cases involving long marriages with a comfortable amount of money accrued during the marriage was pretty straightforward following *White v White*:<sup>13</sup> *'generally speaking that's going to be 50/50, that has made those cases much easier to settle.'* (S23, strong anti-D).

However, research conducted with arbitrators in Australia suggests that practitioners' assumptions that they know 'the range' should be treated with caution (Wade, 2003; see also Hunter et al, 2000). Indeed, not all solicitor interviewees were confident about the existence or parameters of 'the range':

*You can go to an FDR and the judge will tell you his opinion and you go to the final hearing and you get a completely different outcome. ... And clients have said, well, that's not what they said at FDR. And you say, yeah, but that was the judge at FDR. It's always going to be a different judge at final hearing. You can't guarantee the outcome. You should be able to in a certain respect guarantee what the range of outcomes will be. And you can't. You just cannot do it.'* (S16, slight anti-D)

There are clearly some corners where harder-edged guidance would be welcome – interestingly, our interviewees' suggestions all related to non-matrimonial property, a somewhat inchoate area of the case law with which the Law Commission and its consultees also had difficulty (2014b, ch 8). For example:

*So it's fine if you're looking at a straightforward – marriage of 30 years – I've got a colleague at the moment who's got one with £35m in the bank because he's just sold his company and they've been married for 30 years – well, you've got your answer. But if you make them married for 15 years, put £25m of that £35m as pre-acquired, put £5m of it in trust and then say, what's the answer? Actually I don't know – could be £5m, could be £10m, could be £15m. And then that's where it starts getting difficult and then the law and the process doesn't encourage settlement.* (SM32, neutral)

S23's recent case involved a business that the husband was anxious to protect, but the lawyer felt unable to provide clear advice. The husband was:

*absolutely determined to be able to keep running this family farm and I think, to be fair on him, his solicitor's advice certainly early on – from what we could tell – he was being encouraged to think that that was a realistic possibility – and we couldn't point to the law and say, no, you sell it, pay a fair settlement to your wife. So the law wasn't very clear.* (S23, strong anti-D)

However, most cases in which issues relating to non-matrimonial property properly arise are higher value cases – so any lack of clarity on this point is a ‘luxury’ with which most spouses are untroubled.

#### IV. DISCRETION IN PRACTICE: WHAT SHAPES ORDERS AT A LOCAL LEVEL?

We consider now the issue of variation in outcomes between individual judges and individual courts / regions and, if it exists, whether its source is ideological or factual. Individual solicitors’ firms’ surveys of this question have suggested a North/South divide (JMW Solicitors, 2015) or a city courts/provincial courts divide (Pannone, 2013). Fifty-seven per cent of the 234 practitioners who responded to Resolution’s recent survey said that they had issued divorce proceedings in a particular court or area in the belief that that would produce a better outcome for their client (Law Com 2014b, para 2.52, and generally from para 2.47). Woodward’s pension study (Woodward with Sefton 2014, 126-34) also identified some actual and some perceived differences in practice by reference to court location.

Geographical consistency was a key issue for the judicial focus groups in our study, which yielded rich data on that issue. The practitioner interviewees were asked no direct questions about the issue, but some data emerged organically.

##### 1. Different judges?

There was a clear perception amongst some solicitor interviewees that different judges took different approaches. Practitioners gave examples of inconsistent FDR indications; different approaches and variable levels of preparation; and perceptions of pro-wife/pro-husband judges. These practitioners clearly considered judicial variation problematic, albeit a phenomenon that might be used (negatively) as a lever to achieve settlement:

*[I]f you want to argue over every point, the law currently allows you to do that ... but when you are going in thinking – and this is every final hearing – oh, what judge have we got, that tells you something about a law. Because it shouldn’t matter, should it? (S15, slight anti-D)*

One practitioner's recent case (contested, but settled) illustrated local inconsistency, divergent indications about self-sufficiency having been given at the FDA (First Directions Appointment) and FDR. The FDA judge had indicated that the FMH should go to the wife as the primary carer of a five-year old child, but the FDR judge took a completely different view: the property would have to be sold and the wife would have to rent.

*I was quite shocked by the about-turn at the FDR – which of course can happen and does happen – but to have such a stark contrast in views of the judges, emotionally she [the client] found that difficult to comprehend.*  
(S24, slight pro-D)

## **2. Different courts?**

If there are differences between individual judges in the same court, there could certainly be differences between courts. Unsurprisingly, the widely reported surveys and anecdotal but orthodox views about a North/South divide were reflected in both interview and focus group data, with participants suggesting that clean breaks were more likely to be considered in certain courts and areas of the country:

*I think it's 'know your court'. For example, if you want a clean break and you've got children, do not issue proceedings in [court name] because you won't get a clean break order. In the North you will get a clean break order. Down south you may not. In [place] you never will.* (SB3, strong pro-D)

In one focus group, it was clear that the judges' experience (as both judges and practitioners) was that clean break outcomes were less likely in some regions:

*J8: But the only difference in principles I have ever observed is that when I practised in [Region 3] it was a practice of [court 3B] as a matter of principle on a collegiate basis, never to clean break a wife with young children.*

One interview yielded discussion of resultant forum shopping, a practice identified by the Law Commission as potentially problematic:

Int: In terms of getting the order, which court would you normally issue and why?

SM32: *[Local court], or if I'm feeling tactically that actually if I go [elsewhere] husband may not have to pay maintenance.*

### **3. Is the variation based on ideological difference?**

Difference of approach between courts – and individual judges – may be grounded, at least in part, in ideological or ‘cultural’ differences: essentially, a normative disagreement about what constitutes a ‘fair’ outcome on divorce: *‘I think it’s a [Region 3] culture and it’s been there for a very long time.’* (J13). The Law Commission suggested that variation might exist regarding both whether a clean break would be ordered and the duration of any spousal periodical payments award that was made.

This was debated in our focus groups, particularly when we suggested a variation on the facts of the vignette presented: we made the children ten years younger than in the original iteration, significantly extending the length of both their dependency on the primary-carer wife and the resultant potential impediment to her realising her earning capacity. Whereas there had been a shared emphasis on self-sufficiency for the wife where the children were teenagers (which freed her to undertake more paid employment), views were mixed in the case of the younger children. Some judges (from region 3), were willing to consider making a joint lives spousal support order on those facts, whereas others were still likely to order a clean break or, at best, a fixed term order that could be extended.

The difference of opinion on this issue appeared to lie in the expectation of self-sufficiency by the primary carer – what could reasonably be expected of the wife, and what ‘signal’ the judge wanted to send. An important related practical matter was allocation of the burden to apply for variation of the order. Judges who preferred a term order considered that the burden should lie on the wife to seek an extension (rather than on the husband to seek an earlier termination than the original order contemplated). But interestingly, J13 suggested in this exchange that a joint lives order, placing the burden on the payor to seek variation, might ultimately make it easier to achieve an earlier clean break:

J11: *I wouldn’t do a joint lives order even if the children are in the second scenario as young as they are because I think that’s giving the wrong message to achieve - we ought to consider a clean break and one way is*



*to actually try and say to her 'do something to make yourself self-sufficient' and having a term order saying until perhaps the youngest child is 16, I would end it there and not allow the extension of that.*

*J13: See the problem I've got with that is that 16 starts to presume that that's when it's gonna run until. I take the view that the only difference between a joint lives order and a term order is who's got the burden to apply to seek the variation and I would be saying in a case where they are ten years younger, the burden should be on the paying party to come back ... If you do a term order until 16, it's harder for him to say 'hey the youngest child is aged 8, she should now be self-sufficient.'*

However, it was also suggested that the 'orthodox' view about spousal support patterns nationwide might be based as much in urban myth as in fact:

*And there's a good deal of myth making about, you know, everybody's fact-specific; everybody's looking at the facts that they particularly deal with, and we in [Region 3], ... are dealing with a lot of cases where fact-specific reasons, you need to have, delay a clean break. Having said which, I've been generally speaking, terminating on the husband's retirement, depending on the wife's retirement in some cases, for a long time. And I would have thought that the number of cases where I make joint lives as opposed to termination on retirement is very small. ... The idea that we're dishing them out with the rations I think is as much myth as reality. (J7)*

Perhaps instead, as one judge put it:

*It's not the inconsistency of what judges are doing, it's the inconsistency of what you can do with the money that you've got. (J4)*

And so we turn now to the other possibility suggested by the Law Commission – that different outcomes in different courts might reflect the fact that cases in these courts typically present with quite different facts that necessitate – or naturally attract – a different response.

#### 4. Putting the question in context: different courts, different facts?

Before reverting to the qualitative data sources from our study, we introduce some key court file data that appear to support the hypothesis that it is ‘what you can do with the money that you’ve got’ – the practical shaping of individual packages of orders – that largely explains the (necessary) difference in outcomes associated with different courts.

Table 1 shows the variation in median wealth-levels at stake in the four courts surveyed and, in the last rows, the figures for cases in which spousal periodical payments were ordered; the median figures provide a better indication of the general run of cases than the means, which are stretched by high outliers. These figures are based on our *roughly indicative* estimates (for those cases in which it was broadly calculable, in the face of all sorts of difficulties – so these figures are not based on *all* cases in the sample) of the total values of capital assets, pension funds and combined incomes at stake.<sup>14</sup> There is clearly considerable variation in the wealth-levels dealt with by the four courts. Reflecting the husbands’ tendency to have higher-level occupations in these cases, spousal support cases on average involved higher incomes.

**Table 1: combined wealth values by category, for all cases, by court for all cases, and for all spousal pp cases {INSERT TABLE AROUND HERE}**

The prevalence of clean break outcomes (i.e. orders which dismissed applications for spousal periodical payments) was different in each court, mapping the different wealth levels: Court D, catering for the wealthiest population in the study, had the lowest percentage of clean break outcomes (61 per cent), whilst Court A, the next wealthiest, had a 84 per cent clean break rate, and the poorest populations, in Courts C and B, 92 and 97 per cent respectively. We also found that spousal periodical payments were more commonly made following proceedings that had been contested at some point, and here too Court D was distinctive, having the highest proportion of cases that settled after contested proceedings had been commenced. As Table 1 shows, the spousal support case wealth figures are therefore inflated by the preponderance of such orders in Court D: this had 37 out of the 64 spousal support orders in the survey, with 16 in Court A and just eight and three in Courts C and B respectively, out of c 100 cases per court. But in Courts A-C,

the spousal support cases as a group were above average (mean and median) in terms of combined income compared to all cases in those courts.

## **5. Objective justification for variation: interaction of housing, capital and income resources**

With those court file data in mind, we now consider an explanation for the variation indicated by the qualitative data.

The Family Justice Council guidance (2018, para 21) for judges handling needs-based cases notes the interaction of housing needs and income needs, and the variety of sources from which those needs might be met:

Housing (and other capital needs) and income needs are linked and need to be considered in the round. How these needs are most appropriately met and by what form of order, whether by capital provision or (spousal) periodical payments or both, will depend on all the circumstances of the case, in particular the extent of the available capital and income, including – where appropriate – welfare benefits, tax credits and borrowing capacity, as well as existing debts.

Hitchings' earlier research (2009) has suggested that pragmatic considerations often dominate needs-based cases. Similarly, in this study, the judges and practitioners insisted that it's a matter of 'do[ing] the best with what you've got.' (J1). Focus group discussion strongly suggested that regional variation in property values, housing costs, living costs and income levels, and the interaction of income and capital were significant determinants of local patterns of orders and so a significant explanation of regional variation in outcomes.<sup>15</sup> Put simply, where rental or purchase (and so borrowing) costs are lower, the lower-income spouse will be more likely to be able to fund accommodation without spousal support; where housing/borrowing costs are high, spousal support is more likely to be required in order for the lower-income spouse to acquire or retain a home.

For example, during discussion of the vignette, as one would expect given the law,<sup>16</sup> judges in both focus groups suggested that the aim was to get both parties rehoused, prioritising children's housing during their minority. But it was considered

more likely that there would be an immediate clean break incorporating a sale of the FMH if property prices were cheaper. By contrast, the judges' options in the 'higher' property price areas appeared to be more limited. Where possible, both parties would be re-housed and enabled to 'start again' with a clean break by various means, for example by selling the FMH and both parties moving to cheaper areas and/or renting rather than buying new accommodation. But where these options are not feasible owing to high property prices and one party's low income (generally the primary carer<sup>17</sup>), spousal support becomes a more realistic possibility:

*J5: I mean, this is a realistic scenario where I work, that people are in a four-bedroom house which has got a massive mortgage on it. You know, this is a completely realistic scenario, and she would not be able to be anywhere that she wanted to be with three children.*

*J7: Is it the case that an immediate sale is more likely in an area where the property prices are cheaper? In [5A] for example.*

*J6: Yes. In this scenario. [J5: Yes]*

*J:<sup>18</sup> An immediate sale is much more likely than in [Region 3].*

*J: Yes.*

*J6: More realistically, yeah.*

*J3: Because, if you've got a situation where you're selling just for the... for no purpose, just to put the family back into an equally expensive home, or an equally large mortgage, what's the point? And if you're not releasing capital for any purpose to the husband, what's the point? So the dynamic is different.*

Judges from some higher property value areas indicated that cheaper housing might be obtained by pushing the family out 'a few suburbs' (J13), but as this DJ noted, this option would not be available everywhere. Other options included *Mesher* orders,<sup>19</sup> although J6 noted that there would be no need for a *Mesher* in their lower property value area as giving 70 per cent of the capital to the wife in the scenario explored in discussion would re-house her and the children. Other options included downsizing or moving to a less salubrious area. However, as more than one judge noted, parties are often unwilling to do this.

*In [5P] we have two extremes. The majority of [5P] is very poor and usually you're dividing debt, not assets, but we also have places like [5R], which are very affluent as well. So we have little pockets of affluence in the middle of a desert of deprivation quite honestly. ... So, [if] this is a [5R] property and one of the difficulties that you have in that is that if you live in [5R] you will never move to [5P] in a month of bloody Sundays because it's the, you know it's just the back end of the world. So consequently anybody who lives in [5R] is gonna say 'well if I'm gonna have a 3/4 bedroom property it's going to cost me around about what this is - ... So unless I move to [5P] and yes I could easily get a property in [5P] and the husband could have some money as well, but it's too far away for the kids, they're gonna be schooled in [5R] and I can't possibly dream of the idea of moving to [5P]. (J12)*

Another judge explored some of these options before concluding on a pragmatic level: 'do what you can, because you can't achieve what you want to'. (J5) A further judge suggested that the picture was far more complex than typically suggested, with substantial in-region variation and commonalities between poorer parts of each region:

*I think you've also got to be a bit cautious on this North/South divide, because obviously you take this scenario in certain parts of [Region 5 – 5G or 5J], it won't be that different to [county of court 2C]. If you take it to [place name in 5B], you can get three families living for that. (J6)*

These data indicate that even in regions where socio-economic circumstances are generally lower (and so clean break orders the norm), there might be pockets of wealth for which a different approach – without a clean break – might be expected because of housing costs. But judges would nevertheless strive to find clean break solutions, even if the property prices and available capital did not immediately signal that outcome as a possibility: for example, by resorting to renting, shared ownership, or support from family members.

## **6. Objective justification for variation: income levels, living costs, child support and state support**

Self-evidently, where one spouse has a higher income than the other and has significant disposable income (after reasonable housing costs), spousal periodical payments are simply more likely to be feasible, particularly where (as is the norm) there is not a huge amount of capital to divide. Following the previous discussion about pockets of wealth in otherwise generally poorer areas, one judge suggested that the North/South divide is less important than the idea that there's an 'amount of money divide':

*We have in my court, we have a lot of cases that are income-rich and capital-poor. ... And you're much more likely to allow the maintenance to run on much longer in that sort of case, than whereas if you're presumably in [5A], where you're in a different world. (J7)*

Conversely, as the same judge suggested, where both incomes *and living costs* were lower (especially rental/mortgage costs), child support payments might be sufficient to cover everyday needs. Set against this context, it is unsurprising if reported cases (dominated by higher-value cases) feel disconnected from some local practice:

*To a certain extent it's ok possibly to have regional variations between ourselves at our level. When it then goes up to a high court judge who says 'I now give you' like the Ten Commandments – 'here are the Ten Commandments of a spousal maintenance order' – it then becomes a little more problematic. (J13) [Other judges agreed with this comment]*

Whether self-sufficiency is achievable will also depend upon the constraints of working around childcare (and its likely costs) and school hours. Tax credits have also been a vital part of the jigsaw puzzle for many 'everyday' case resolutions – the worked examples in the Family Justice Council's guidance (2018, Annex 2) demonstrate the contribution such state-based support can provide, supplementing what may be only modest earned income. Self-sufficiency in a needs case may not be about increasing the wife's (primary carer's) income in the long-term (i.e. beyond the child's majority), but moving it from one source to another, or at best minimising the loss when the cliff-edge of child maintenance and child-related benefits/tax credits terminating is reached.

It seems reasonable to suggest that in certain parts of the country, self-sufficiency is simply more feasible as a short-term goal because property prices and other living costs are more accessible, and child support payments (supplemented by child benefit and tax credits) will cover income needs. Conversely, where living costs (especially housing) are higher, self-sufficiency for the primary carer may be harder to achieve without spousal periodical payments to supplement that household's income. But the advent of Universal Credit (UC) marks a significant change. Unlike the former tax credit rules, UC means-testing rules reduce UC receipt for every £ of *spousal* support received. By significantly reducing the scope for increasing primary carer's household incomes through both spousal *and state* support, this fundamentally alters the practical options for those minority of cases that have relied on both sources to make ends meet in primary carers' households post-divorce.

## V. DISCUSSION

The data reported above shed light on the characteristics of discretion as a settlement and decision-making tool, and about possible causes of variation in outcomes. Both issues raise important questions: the first about how well private ordering works in a discretionary space, the second about the *legal* grounding of decision-making in these cases and the permissibility of particular types of variation.

### 1. Rules or discretion: which is the better tool?

The literature is divided on which of discretion or more rule-like norms is 'better' for achieving settlement, and the point is hard to test empirically (cf Harvey et al, 2012). As we have seen, several interviewees appreciated discretion's accommodation of bespoke solutions, but 'freedom' to take account of extra-legal considerations in reaching settlement may be undesirable (see Hunter, 2018). For example, we identified cases in the court file survey in which it appeared that some parties who were being divorced on the basis of their adultery (or allied behaviour allegations) were under-provided for overall, suggesting that their guilty conscience and/or the other party's desire for retribution was generating an outcome that no court would, in an adjudicated case, have ordered. Data previously published from this study have also shown how eventual outcomes under the current law are at least in part the product of the parties' respective legal and emotional capacity to keep pushing for a

good deal, and of various other non-legal, inter-personal factors that influence settlement (Hitchings et al, 2013).

Ambiguity about bargaining endowments created by legal rules exacerbates uncertainty concerning outcomes at court (Mnookin and Kornhauser, 1979: 966) – particularly where one or both parties cannot afford legal advice that might otherwise have reduced the uncertainty. That then makes more critical the parties' respective capacities (financial and otherwise) to deal with the costs of uncertainty and their innate risk aversion (or otherwise).

People's response to such situations may also be a function of gender. Wilkinson-Ryan and Small (2002, 111-12, see also Hunter, 2018), reviewing empirical studies of bargaining behaviours by reference to the parties' genders, noted that '[s]ince gender differences are typically larger when situations are ambiguous, indeterminate legal standards may provide a context in which gender is more likely to matter'. They observed (ibid at 132; see also Behrens, 2002):

We might assume, for example, that indeterminate rules leave the parties less constrained in their private negotiations and thus better able to maximize their joint welfare. But if the empirical data suggests that the parties are not maximizing joint welfare or that there is a systematic imbalance between them (and it does), we might question the value of indeterminate rules and their utility for the normative model.

Lack of transparency about what the law is might impede people from bringing, or progressing, proper claims (Rogerson and Thompson, 2008, 10), and some interviewees' comments in our study suggest that some people settle rather than litigate in the face of an uncertain outcome. The clients of the practitioners whom we interviewed at least had the benefit of legal advice to help steel them in negotiations. But many divorcing individuals lack that advantage. With only around a third of divorces now being accompanied by any financial order (MOJ 2018, table 13), it is very difficult to know what (necessarily private) settlements (if any) are being reached. But Fisher and Low's analysis (2009, 2016, 2018) of general population longitudinal data suggests that, women are (on average) economically disadvantaged on divorce in terms of significantly reduced equivalised household income, while men's position (measured in those terms) on average even improves.



As the Law Commission noted (2014b, para 2.54), advocates of discretion whose argument is premised on judicial or lawyer involvement fail to acknowledge the reality of contemporary family justice. The ‘off radar’ individuals may or may not be benefiting (legitimately) from the discretionary system’s room for ‘bespoke’ solutions (see Hitchings, 2017). Freely choosing and agreeing upon a bespoke solution is one thing; ending up with an outcome that overlooks legal entitlements and opportunities entirely is quite another.<sup>20</sup>

If the law and legal system are not sufficiently accessible that people feel able to assert claims to which they are entitled, we have a basic problem that should give pause. But these problems would not necessarily be cured by more rule-like provisions. In their different way, these might create as much scope for argument, albeit focused on different factual issues, and so still favour those with greater capacity to fight the case (and greater access to legal advice). More rule-like provisions would also reduce the system’s capacity to deliver individualised solutions. But that takes us back to the question of what discretion – as a juristic tool – is for, and what degree or type of variation in outcome is acceptable in a *legal* dispute resolution system.

## **2. The ‘problem’ of variable outcomes and the permissible limits of discretion**

Discretion, misunderstood or misapplied, attracts opprobrium. Can family lawyers really claim to be pursuing justice under the law, or are outcomes in these cases arbitrary?

### *A. Avoiding mere arbitrariness*

Holman J recently defended English financial remedies law’s discretion against accusation of ‘arbitrariness’, whilst acknowledging that two different judges might well produce differing answers, saying:

69. ... I, personally, consider that there is ... a distinction between an award which is arbitrary in the true sense, and one which is the product of judicial discretion. An arbitrary result would be one yielded by sticking in a pin, or tossing a coin, or drawing a lot. Judicial discretion is the product of a weighing of all relevant factors and wise, considered and informed decision making by an experienced adjudicator after hearing

argument. My decision is a discretionary one, but it is not an arbitrary one.<sup>21</sup>

Many judges and practitioners would support Holman J's position. It is commonly suggested that one needs merely to 'do the section 25 exercise', i.e. work through the statutory checklist of relevant factors before reaching a rounded decision in the exercise of judicial discretion (or private settlement attained on the same basis). But that position overlooks section 25's failure to indicate an objective for financial remedies law, and so the potential for outcomes that are markedly divergent at the level of principle.

### *B. Practical variation versus substantive variation*

The data discussed above address the two causes of variation identified by the Law Commission (2014b):

1. *practical*: variation driven by factual circumstances (particularly local housing costs and income levels) with which judges in different courts are typically presented; and
2. *substantive*: variation attributable to ideological disagreement about the principles that broadly determine what financial remedies should be seeking to achieve.

It seems plausible that these two causes are inter-linked. The 'culture' of a particular court may be driven not (or not only) by *pre-existing* ideological positions of local judges. Rather, the court's socio-economic environment will generate a patterning of orders dictated by those local conditions. Over time this may become, or appear to become, concretised as local 'norms' or principles, when at root it is just a proper response to the local situation. But there may then be a feedback loop. A given court's typical caseload might generate a particular type of 'standard' response that conditions the judges' attitudes towards financial remedy cases generally. This may mean that different judges, conditioned by different local circumstances to produce particular standard responses, might produce different answers on similar facts, particularly in cases that sit on the borderline of their respective everyday experiences.

In thinking about discretion and its permissible limits, it is helpful (see Miles, 2017 for fuller discussion) to draw on the writing of Carl Schneider (1992) and Herbert Hart (1956).

Schneider provides a useful typology by which to categorise and evaluate discretion, reflecting the legislator's underlying purpose (more or less positive) for deploying discretion: (i) a '*rule-failure*' discretion: the legislator stops trying to develop a rule and effectively passes the buck to the judges; (ii) a '*rule-compromise*' discretion: the legislator finds it politically impossible to articulate a more rule-like provision but achieves support for a relatively anodyne, high-level norm that may be understood in various ways by individual parliamentarians; or (iii) a '*rule-building*' discretion: the legislator feels ill-equipped to make the necessary judgements, but considers that the judges, will – with accumulating experience – be able to identify appropriate principles to achieve consistent outcomes.

Hart had earlier identified two problems that make discretion as a mode of legislative law-making appealing, even unavoidable, and that can explain resort to one or other of Schneider's discretion-types: *relative ignorance of fact* (RIF) and *relative indeterminacy of aim* (RIA). RIF is the legislator's inability to anticipate all conceivably relevant fact-patterns, making it impossible to create a rule to govern the particular issue – at least, one judged likely to generate 'fair' outcomes for the majority of cases. Critical here is the judgement about what facts might be 'relevant' and so about what is thought to be 'fair' in the context – and about whether the much more 'average justice' (Rogerson, 2002, 6) that a rule will inevitably produce (if not Prussian in its degree of detail) is tolerable. But that brings us to RIA: the legislator may be unable either to achieve political consensus on any clear aim for a new law or to identify an aim that will stand the test of time. The diverse circumstances of family life and fast-evolving social norms and behaviours are likely to produce one or both of those difficulties, and so the legislator will fall back on some more open-textured norm.

The phenomenon of RIF may be both benign and inevitable: it is manifested in this context by the *practical* variation of financial remedy outcomes driven by local socio-economic circumstances. We may therefore positively want room for discretion to be able to accommodate these issues – 'rule-failure' sounds unduly negative here: discretion may simply be the only feasible way of achieving the objective. By

contrast, RIA – the generator of *substantive* variation – poses a far greater challenge, for without agreed substantive principles, it may be doubted whether justice is being provided for by *law* at all, rather than (in those rare cases of adjudication) simply by *judge*. The case for rule-building, by someone, in order to counter RIA was made compellingly by the American Law Institute (2000, at 811):

The fact that reasonable judges may differ on a policy choice does not make it beneficial that they should. There is no utility and considerable cost in accommodating varying judicial preferences concerning the minimum tolerable income disparity, or the minimum marital duration at which an award should normally be required. Such variation will uncover no adjudicative principle to guide later decisions, but will impose a considerable cost in inconsistency, unpredictability and the perception of adjudicative unfairness as neighboring cases yield different results because of different judges rather than different facts.

But if the legislator fails or compromises, articulating no principles or only high-level principles, only the judges can do the work necessary to achieve justice under law – and that requires them to interpret the governing legislation as conferring a rule-building discretion. So what of the English position?<sup>22</sup>

### *C. The case of English financial remedies law*

In the case of the Matrimonial Causes Act 1973, the legislator failed – when reforming the law in 1984 – to stipulate even an anodyne objective. So the courts were left to decide that ‘fairness’ was the aim, informed by the non-exhaustive statutory checklist in section 25, on the back of which they have built a set of principles – need, compensation, sharing – to give substantive content to ‘fairness’. By adopting a relatively soft rule-building mode, the appellate judges have attempted to encourage substantive consistency in decision-making, itself an important criterion of fairness and of the rule of law.<sup>23</sup>

Baroness Deech objects to the current position, challenging the legislator to face down the RIA problem: ‘It is Parliament’s job to make policy in the interests of the entire country. It is the judges’ job to apply it, not to determine the legislation.’<sup>24</sup> But at least one solicitor interviewee in our study wanted judges to articulate the governing principles:

*So I think that the way it is at the moment is fine because it's effectively judge-led, and judge-led is in my opinion preferable to Parliament because judges are on the ground. Whilst they might have this image of not being part of the real world, they're very conscious of what's going on and I have more confidence in the judiciary than I have in elected non-lawyers who are creating law. (S17, strong pro-D)*

But whoever develops that framework of *substantive principle*, legitimate *practical* variation may occur, accommodating structurally different *forms* of settlement (consistent with those principles) that are suited to particular economic circumstances and preferences – as exemplified by the discussion of clean breaks in the judicial focus groups reported above (for similar discussion in the Scots law context, see Mair 2018). This distinction was recognised in the Family Law Bar Association's response to a recent Law Commission consultation:

One reason for [the high settlement rate] is the flexibility inherent in the judicial process. Any agreed financial remedies order will have a number of different components e.g. capital award, income, term order, pension share. Each of the parties will have their own priorities e.g. a wife may seek an enhanced capital award to provide her with financial security, a husband may seek a clean break to ensure that he alone benefits from the success of his business in future years. ... Under the present system there is scope for parties to arrive at a *form* of settlement that suits everyone in each case. ... We do see merit, however, in setting out more clearly the potential bases or *principles* under which spousal support might be justified, and asking applicants (and courts in contested cases) to identify which basis leads to an order being made. [emphasis added] (Law Commission 2014a, at 389-90)

The *substantive* principles identify, in broad terms, the economic value that needs to be transferred or, more descriptively, the economic position in which each party should be placed by the order. And a *practical* decision is then taken about *how* to give effect to that in each case, given the available assets, local housing and other living costs, and so on. Greater uniformity – greater constraint of discretion – at the substantive level need not inhibit the exercise of discretion at the practical level when the precise terms of the order (made within the parameters prescribed by the

substantive principles) come to be structured, provided the tool-box of remedial powers is sufficiently varied and flexible.

### **3. Routes to greater substantive consistency**

The question remains how any ideological inconsistency present in English financial remedies law can best be cured. As we noted earlier, the choice is not a stark one of strong discretion or strict rules. Those options are poles at opposite ends of a spectrum of juristic tools that afford a greater or lesser degree of flexibility (Sunstein, 1995). So the better question is where on the continuum between the two poles one wishes to position the law. But we have also seen that there are at least two levels at which this choice needs to be made: the level of substantive (governing) principle, and the level of practical (structural) selection of the form of individual orders. Discretion in the latter is both desirable and necessary, and not incompatible with ensuring clarity of shared principle at the former level. It might be that the current balance is right, at least in *theory*, but that there are undesirable ideological inconsistencies in the *operation* of law that require correction. So how to go about it? Beyond simply leaving the matter to the appellate judges, reform options rest with provision of authoritative guidance, the operation of the family justice system, and the legislature.

#### *A. Advisory guidelines?*

One potentially ameliorating measure is the provision of authoritative guidance. A relatively light-touch example is the Family Justice Council's (2018) guidance for judges/lawyers on the proper operation of the MCA discretion in relation to 'financial needs', and the accompanying guidance for lay parties (Family Justice Council 2016, and Advice Now). These guides have been devised – on the Law Commission's recommendation – both to help achieve greater consistency of approach between legal professionals and to provide clear information about the current law to private individuals.

More ambitiously – and deploying a relatively novel form of juristic tool along the spectrum – guidelines might entail a formula that expresses quantitatively the 'range' within which settlement of a case should as a matter of *principle* be reached. The precise detail and practical structure of the orders are then tailored within that range in light of particular features of each case and party preferences. This model is

exemplified by the highly influential, yet non-legislated Canadian Spousal Support Advisory Guidelines (Rogerson and Thompson, 2008; see also the more prescriptive ALI, 2000 formula). Such an approach – undoubtedly challenging to devise – has the potential to offer parties a more tangible sense of what their settlement should look like, and a clear starting point for negotiation that articulates at least a minimum level of provision to which the economically weaker party might be entitled.<sup>25</sup>

### *B. Family justice reform?*

A further, more practical way of tackling substantive inconsistency, if only for those cases that do reach the court in some form, lies at first instance ‘system’ reform. It was suggested in the judicial focus group discussion that geographical variation might lessen as a result of the most junior first instance judges (Deputy District Judges) being moved around to different courts as needed:

*And I wonder whether the introduction of the Family Courts where suddenly we’re Deputies, we can travel wherever we like. Whereas in the past we were fairly limited. I mean we get ... this morning I’ve had two emails saying can you sit anywhere in this. I think that’s meaning that deputies are travelling much more and therefore that’s again adding to the fact that one culture in one place is moving around. (J13)*

Such changes might dilute the geographical inconsistency. However, without more, flexible deployment of junior judges might simply produce less *predictable* inconsistency, i.e. one not relatable to any particular local tribunal.

There is therefore a strong case for creating judicial specialty in this area. By contrast with all child matters dealt with by the Family Court, District Judges allocated financial remedy work need no specialist experience or training. These cases may therefore be handled by DJs whose own legal practice was not in family law, and who have had only minimal training. Development of a cadre of specialist judges, who convene for frequent in-depth training, could itself be a powerful tool for achieving greater predictability and consistency (O’Dwyer, Hess and Miles, 2017).<sup>26</sup> A pilot project for a network of Financial Remedies Court is currently under way.

### C. Legislative reform?

Lastly, there is the option of legislative reform, currently being promoted in England & Wales by Baroness Deech (2017). The legislator can prescribe more dispositive legal principles that sit nearer the rules-end of the spectrum only if and to the extent that Hart's problems of RIF and RIA can be neutralised or at least reduced.

Tackling RIA through legislation requires parliamentary consensus on aims for the law that can be reduced to more rule-like (or principled) statutory language.<sup>27</sup> In order to make any appreciable advance on the current law, this would require a willingness to accept a more tightly specified, homogenously applicable set of legal norms, and so perhaps to adopt a more average (but uniform) *substantive* sense of justice, than the MCA on its face currently provides. Even if it can be agreed that the law should *have* clearer principles, agreeing *what* governing norms to adopt may prove harder, as different legislative members endorse different ideologies of marriage and how they should be reflected in financial remedies on divorce.

Tackling RIF may also prove challenging: it would involve tolerating more 'average' than 'individualised' justice (Rogerson, 2002, at 6) in that *factual* sense, i.e. the finer factual details of individual cases would be removed from the substantive equation as not sufficiently pressing to impact on the required decision. Fans of discretion would find that hard to take. However, a more rule-like or principled statutory approach could set a clearer ideological, substantive course whilst retaining space for the sort of necessary *practical* variation that we have discussed above. Moreover, no legislation could eliminate the influence of extra-legal considerations and parties' own norms in reaching private settlement – certainly not in a system where parties are free to divorce without any judicial approval of their financial arrangements (Barlow et al 2017). But by providing a clearer sense of what the parties' legal entitlements were, and so levelling the playing-field somewhat, more clearly legislated principles might reduce the influence of extra-legal factors.

## VI. CONCLUSION

The rules / discretion debate can elicit hypocritical responses. People see the theoretical virtues of certainty, but want individualised justice for themselves:



*I think parties would like in theory – not in practice, but in theory – they would like there to be a grid system whereby they typed in all their assets and circumstances and the answer popped out. ... So I think they like the structure and framework of knowing what might happen if it goes to court. But it's a bit like public transport. It's a wonderful system for everybody else but I want my car. So I think it's a bit of a double-edged sword. I think they like the idea that it exists and it will suit other families, but my particular family circumstance is so special that I need a much bigger share of the assets than the law would allow. (M9, neutral)*

But, to change metaphor, whilst we might all wish to have tailored suits, as Baroness Deech has observed, the vast majority of us can only realistically aspire to the output of high street retailers.<sup>28</sup> Even the high street store is easier to navigate with the in-store personal shopper to hand. But with the withdrawal of legal aid, the personal shopper is no longer available to most financial remedy customers. Discretion – even if corralled by judicial principle, consistently applied to those cases that reach court, by consent or otherwise – is a difficult juristic tool for parties without legal advice and assistance to deploy in private ordering.

An immediate (if unlikely) ameliorant of current concerns would lie in the reinstatement of legal aid, so that individuals could be supported in their negotiation of what (given the subject-matter, whatever the governing law) are often inherently difficult, technical questions. But the nature and operation of the governing law are also critical. Divorcing parties are entitled to consistent treatment of cases. Substantive law reform by statute, inevitably an unsettling course of action that can generate legal uncertainty for some years while the new scheme comes to be interpreted and applied for the first time, may be neither the best nor the most proportionate way of achieving that – nor may it be politically attainable. The development of guidelines akin to those operating in Canada would require considerable work and would have to overcome considerable professional scepticism, as expressed by some of our interviewees.

In the meantime, attention falls on what can be achieved through other routes. First, the further development of judicial principle. At the time of writing in summer 2018, the Supreme Court has the opportunity in *Mills v Mills*<sup>29</sup> to articulate substantive principles for 'everyday' cases that could be transmitted to divorcing

individuals through the Family Justice Council / Advice Now guidance. And second, through judicial training and specialism, which should help to bring in the ideological ‘outliers’ and so achieve more substantive consistency. These changes should be given time to bed in and their impact assessed before more radical change is contemplated.

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<sup>1</sup> E.g. the NZ Law Commission project reviewing the Property Relationships Act 1976, and the new review of the Family Law Act 1975 by the Australian Law Reform Commission.

<sup>2</sup> See, for example, judicial responses published at Law Commission, 2014a.

<sup>3</sup> Hansard HL Deb, col 946-947, 27 January 2017, Divorce (Financial Provision) Bill [HL].

<sup>4</sup> Ibid, col 948

<sup>5</sup> Ibid, col 959.

<sup>6</sup> 22 solicitors (including six who had also trained as mediators) and 10 mediators. Whilst we endeavoured to obtain a cross-section of experience in the recruitment of our interviewees – the mediators, for example, had a diverse range of professional backgrounds prior to becoming mediators – our sample consisted predominantly of senior and/or experienced practitioners: 26 had over 10 years post-qualification or family mediation experience.

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<sup>7</sup> Quotations from the interviews and focus groups are labelled pursuant to the following code: S for solicitor, M for mediator, SM for solicitor-mediator and J for Deputy and District Judges. Places (regions, specific cities/towns and courts) mentioned in the focus group discussions are coded such that numbers denote regions and letters denote places / courts within each region, e.g. location 5A is in region 5. In order to aid preservation of participant anonymity, the four courts included in the file survey are simply denoted courts A to D, without connecting them to interviewees' locations or to any particular places that may also have been referred to in the focus groups.

<sup>8</sup> In outline, it involved a 20-year marriage with three children now aged 17, 14, and 12, a four-bed FMH worth £500,000 with a net equity of £250,000, and a traditional division of labour with wife currently working part-time only. Later in discussion, the ages of the children were reduced by ten years to explore further the range of possible outcomes.

<sup>9</sup> The analysis was based on the practitioners' response to questions asking whether they thought a more prescriptive law would impact settlement and/or negotiation. The quotations used in the following discussion may not always appear to match the designation we have given each interviewee, based on those answers, as the quoted material is drawn from the entirety of the interview transcript. We were unable to discern the views of two practitioners, M7 (who was not asked about this point) and M10 (who answered in a tangential manner).

<sup>10</sup> For an account of the troubled history of the UK child support scheme, see Fehlberg and Maclean (2009).

<sup>11</sup> A hearing designed to facilitate settlement, with the judge providing an indication as to outcome.

<sup>12</sup> Approximately two-thirds of couples obtain no financial order on divorce: (MoJ, 2018) Table 13. Of those who obtain orders, around 70% apply at the outset for a consent order, with only 5-9% ultimately obtaining an adjudicated order from a judge (ibid, table 15).

<sup>13</sup> [2001] 1 AC 596.

<sup>14</sup> More information about these figures is provided in Miles and Hitchings (2018). Our broader calculation methodology is explained in detail in an unpublished working paper. General methodological information – including sampling method – for the court file survey is explained in Appendix A of Hitchings et al (2013).

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<sup>15</sup> Woodward (2013) noted in her study that ‘when judges mentioned differences between the courts [in focus group discussion], they tended to refer to socio-economic factors and the demographics of the area rather than to court culture as such’: p 132.

<sup>16</sup> MCA 1973, s 25(1) and *M v B (Ancillary relief proceedings: lump sum)* [1998] 1 FCR 213.

<sup>17</sup> See Miles and Hitchings (2018) on the link between spousal support and presence of children.

<sup>18</sup> Identity of speaker could not be discerned from recording.

<sup>19</sup> These, and cognate orders over the FMH such as *Martin* orders and transfers with charge-back, were unusual in the court file survey, made in only 16 cases – outright transfer and sale were by far the most common resolution for owner-occupied homes, whether effected by the order or privately.

<sup>20</sup> See Hunter (2018) and Barlow et al (2017), chapter 8 on how gender dynamics and gender-based norms can influence negotiations: especially pp 177, 193, 196.

<sup>21</sup> *Robertson v Robertson* [2016] EWHC 613.

<sup>22</sup> For contrast with Australian law, see Fehlberg and Miles (2018).

<sup>23</sup> See Lord Nicholls’ defence of this exercise in *Miller, McFarlane* [2006] UKHL 24, at [6]-[7], striking a very different note from the High Court of Australia in *Mallet v Mallet* [1984] HCA 21, rejecting similar judicial activity under the Family Law Act (Australia) 1975; and remarks of Moylan LJ in *Waggott v Waggott* [2018] EWCA Civ 727, who has previously appeared to be amongst those judges below House of Lords / Supreme Court level more wedded to strong discretion, e.g. in *Hart v Hart* [2017] EWCA Civ 1306.

<sup>24</sup> Hansard HL Deb col 947, 27 January 2017.

<sup>25</sup> The Canadian guidelines deal with the quantum and duration of support (which can then be capitalised rather than paid periodically), but not the prior question of entitlement.

<sup>26</sup> See also observations made by Woodward with Sefton (2014) at 164-6.

<sup>27</sup> Cf the Family Law (Scotland) Act 1985: see Mair (2018) discussing this legislation and highlighting key differences between that Act and Baroness Deech’s Bill, and noting the way

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in which Scots law balances certainty and flexibility along substantive/practical lines similar to those explored in this article.

<sup>28</sup> Hansard HL Deb, Baroness Deech col 947, 27 January 2017 and col 379, 11 May 2018.

<sup>29</sup> [2017] EWCA Civ 129.

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{Table 1 to be inserted above: }

**Table 1: combined wealth values by category, for all cases, by court for all cases, and for all spousal pp cases, with number of pps per court**

		<i>Number pp orders</i>	<i>£Non-pension</i>	<i>£Pension</i>	<i>£Income combined</i>
<b>All courts, all cases</b>	<i>Mean</i>		<b>583,035</b>	<b>192,8341</b>	<b>55,807</b>
	<i>Median</i>		<b>117,080</b>	<b>72,437</b>	<b>37,746</b>
<b>Court A</b>	16	<i>Mean</i>	209,090	185,913	47,715
		<i>Median</i>	113,326	59,875	37,080
<b>Court B</b>	3	<i>Mean</i>	112,023	112,737	32,949
		<i>median</i>	63,304	44,500	31,475
<b>Court C</b>	8	<i>mean</i>	174,019	119,438	37,508
		<i>median</i>	72,166	61,146	33,468
<b>Court D</b>	37	<i>mean</i>	1,863,976	331,817	119,828
		<i>median</i>	549,443	127,737	87,018
<b>All spousal pp cases<sup>[note]</sup></b>	<b>64</b>	<i>mean</i>	<b>721,970</b>	<b>260,113</b>	<b>84,299</b>
		<i>median</i>	<b>293,300</b>	<b>112,502</b>	<b>78,642</b>

<sup>Note</sup> Numbers here are inflated by one very high capital value case (>£10M), without which the means would be c.£560K, £237K, and £82K and medians £281K, £103K, £79K.